IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NOs. PD-0108-20 & PD-0109-20

BRADLEY JACOBS SHUMWAY, Appellant

v.

THE STATE OF TEXAS

ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW
FROM THE NINTH COURT OF APPEALS
MONTGOMERY COUNTY

NEWELL, J., delivered the opinion of the court in which KELLER, P.J., and HERVEY, RICHARDSON, KEEL, WALKER, SLAUGHTER and MCCLURE, JJ., joined. SLAUGHTER, J., filed a concurring opinion. YEARY, J., concurred with note.

If a defendant confesses to the offense of indecency with a child against a child who can't communicate and the conduct resulted in no apparent injury, should a conviction be overturned because there is no evidence of the crime itself besides the defendant's confession? No. When sufficient evidence exists in the record to support the conviction for

a sexual offense with no perceptible harm against a pre-verbal child victim and a defendant's confession is sufficiently corroborated, the failure to satisfy the *corpus delicti* rule should not bar conviction.

In this case, Appellant voluntarily confessed to his pastor and then later to his wife. In each confession, he admitted that he pushed aside a pre-verbal, seventeen-month-old infant's diaper and touched her genital region with his hands, mouth, and penis. While the State corroborated the confessions by presenting details showing opportunity, motive, and a guilty conscience, the confessions themselves were the only evidence that the touching had occurred. Appellant challenges his dual convictions for indecency with a child by arguing that the State's evidence was not sufficient to satisfy the *corpus delicti* rule. The State responds that the evidence did satisfy the *corpus delicti* rule, but, in the alternative, the State also argues that we should recognize an exception to the rule "for cases involving trustworthy admissions of sexual offenses committed against victims incapable of outcry."

We disagree with the State's first argument but agree with its second. Crimes against children, such as indecency with a child, often involve victims who lack the ability to relate the occurrence of the crime. In addition, indecency with a child is not an offense that would ordinarily

cause perceptible harm. Failing to recognize an exception to the *corpus delicti* rule under such circumstances would result in the inability to prosecute such crimes despite the existence of a voluntary, reliable, and corroborated confession. Because the record contains evidence sufficiently corroborating facts in the Appellant's confessions, the *corpus delicti* rule should not bar his convictions.

The Confessions

In September of 2016, Appellant reached out to Thad Jenks, his bishop, to "make a confession[.]" As a bishop, Jenks regularly provided spiritual advice to members of his congregation and sought to "help those who confess and are wanting spiritual advice to go through the repentance process and try to change who they are as people[.]" Jenks didn't know what Appellant wished to discuss prior to the meeting, but Appellant soon made clear that he wished to discuss "improper contact with a young child."

Appellant told Jenks that he and his wife watched two children over a weekend for their friends. While the children were at Appellant's home, "he took the young daughter into his bedroom and moved aside her - - pulled down a little bit her diaper and touched her in her genital region with his hands, with his tongue, and with his penis." Jenks knew of the

child because her parents had previously gone to church in his ward.[1] The child was seventeen months old at the time of the confessed conduct.

After this meeting, Jenks asked the child's parents to come speak with him regarding Appellant's confession. The child's mother was very surprised to learn about the confession because she and her husband had been family friends with Appellant and his wife for many years. After the meeting, the parents contacted law enforcement to investigate.

Meanwhile, after his meeting with Bishop Jenks, Appellant voluntarily told his wife that he needed to talk to her about something that happened while he was watching the child in early August of 2016. During their conversation, he confessed that, "while they were here I touched [the child]'s genitals with my hand, my mouth, and my penis." Specifically, he said that he took the child to his bed in the master bedroom, left the door open, and touched the child with his penis, mouth, and hand. He admitted to reaching underneath the child's vagina and "using one of his fingers there," but he couldn't recall "how far it went in." He claimed that he ultimately stopped because he was interrupted by the foul smell of the diaper as he was using his mouth. Then, while "using his

[1] We refer the victim, victim's family, and other select individuals without using their names in accord with the dictates of the Texas Constitution. *See* Tex. Const. Art. I, § 30.

hand a little bit later," he realized that he was doing something very wrong. He admitted to doing all this while his wife was talking to their daughter on the back patio and he was inside watching the child alone.

Appellant initially attempted to justify his conduct by explaining that he was "curious whether it would give him an erection or not." He went on to point to his feelings of anger at perceived sexual and emotional neglect from his wife. According to Appellant, he resented his wife for going to lunch with her friends during the weekend and leaving him in charge of watching the children. Appellant blamed his wife for not putting shorts back on the child after changing her diaper and leaving her to run around in her diaper.

Appellant's wife remembered keeping the child in early August at a time consistent with Appellant's confession and remembered talking with her daughter outside on the back patio that weekend for fifteen to twenty minutes while Appellant watched the child inside. She specifically remembered both going to lunch with friends that weekend and leaving shorts off of the child because the available shorts were too constrictive. She also remembered Appellant "fasting a lot and [being] somewhat withdrawn" after the weekend. While Appellant's wife did not describe the exact relevance of fasting, she did note that it was unusual and

signaled that "he was having a spiritual experience with God or something[.]"

The Investigation

At the urging of law enforcement, specifically Sergeant Jody Armstrong of the Montgomery County Sheriff's Office, the child's parents took her for an exam at Children's Safe Harbor, a multi-disciplinary group designed to be a "one-stop shop to make things easier for the families and to collect information on" crimes against children. At Children's Safe Harbor, the child was examined by Jamie Ferrell, a forensic medical examiner and clinical director of forensic nursing services for the Memorial Hermann Healthcare system.

Children's Safe Harbor required children to be three years old or older before they could conduct an interview because a child younger than three is considered "pre-verbal." Ferrell noted that the child was pre-verbal at seventeen months old and that the child's primary mode of communication was "pointing" and "making unidentifiable sounds." Although the child "knew a few words," she did not speak in sentences and was never able to relay information about the incident to either Ferrell or her mother. Because the infant was pre-verbal, Ferrell asked the child's mother basic intake questions for the exam. The child's

mother noted that she and her husband left their kids with Appellant and his wife and, after this, Appellant told his Bishop that "he was going to change [the child]'s diaper and he touched her over the diaper with his tongue and hands and penis, but it was all done over at [sic] the diaper."[2]

As expected, Ferrell's examination provided no evidence of a sexual assault.[3] According to Ferrell, evidence collection is usually only done within 96 hours of an assault and the exam was scheduled "some time from when it had happened." Because of the time lapse and the age of the child, Ferrell was unable to determine whether there was "any kind of penetration or ejaculation." She also noted no body surface injuries or injuries to the child's genital areas. Ferrell explained that she would not have anticipated finding injuries because the assault was described as "touching to the area" and "rubbing to the area," which would not realistically cause injury. Finally, Ferrell noted that even if there had been penetration she would not expect there to be apparent injury

[2] At trial, Jenks denied telling the child's parents that Appellant told him the contact was over the diaper. Similarly, the child's mother testified that she had informed the examining nurse that "there was contact, I was told there was contact at the - - with her vagina, and it was skin-to-skin contact." She clarified that she received that information from Jenks.

[3] The child's parents also booked an appointment with their pediatrician to check the child for any physical injuries or sexually transmitted diseases (STDs). Not surprisingly, given the nature of the confession, the family pediatrician found no evidence of injuries, and all tests for STDs were negative.

because "this part of the body is very similar to the cells on the inside of your cheek, and it heals very, very fast."

The Trial

The State charged Appellant with aggravated sexual assault of a child and indecency with a child.[4] At the trial, Sergeant Armstrong, Bishop Jenks, Appellant's wife, Ferrell, and the child's mother testified to Appellant's double confessions, their memories from the surrounding time period, and the results of the medical examinations. At the close of the State's case, Appellant moved for a directed verdict and argued that the State had failed to show independent evidence of the crime under the *corpus delicti* doctrine because it failed to present independent evidence of the sexual touching other than the Appellant's confessions. The Appellant specifically pointed to the lack of eyewitness testimony, DNA evidence, injury, or outcry from the victim. The State argued that the Appellant's confessions were sufficiently corroborated by pointing out details within the confession, such as the date and the child's lack of shorts, that lined up with testimony from other witnesses. After listening

[4] *See* TEX. PEN. CODE §§ 22.021 (Aggravated Sexual Assault), 21.11 (Indecency With a Child).

to the arguments, the trial court denied Appellant's motion.[5]

The jury found Appellant not guilty of aggravated sexual assault, returning instead a verdict of guilty on the lesser-included offense of indecency with a child by contact. The jury also returned a verdict of guilty on the separate count of indecency with a child.[6] Appellant waived jury punishment and, after a punishment hearing in which both sides presented evidence, the trial court sentenced Appellant to twenty years confinement with a $5,000 fine on each count to run consecutively.[7]

Appeal

In his sole point of error on appeal, Appellant argued that there was insufficient evidence of the *corpus delicti* of the charges of indecency with a child. Appellant contended that his two extrajudicial confessions were not legally sufficient evidence of guilt "absent independent evidence that

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[5] Appellant also requested a jury instruction on the *corpus delicti* doctrine, which was also denied.

[6] The indecency with a child by contact charge provided for a conviction based upon contact by Appellant's hand or finger while the lesser-included indecency with a child provided for contact by Appellant's sexual organ.

[7] During its punishment case, the State provided evidence that the Appellant had previously confessed to a similar incident involving a small child while he and his wife lived in Utah. According to Appellant's wife, Appellant confessed to touching the other child's vagina and mouth with his penis. On a separate occasion, Appellant informed his wife that he entered the home of a female neighbor and walked into her apartment bathroom while she was showering. Appellant also informed his wife that he poked a hole through the bottom of a floor vent in the bathroom of the family's trailer so that he could watch his daughter prepare to take a shower. In addition, Appellant told his wife that he had taken a mirror and used it to look underneath the bathroom door to watch her sister getting into the shower. The State also presented evidence of the Appellant's addiction to pornography.

a crime was committed by someone."[8] The State argued that the two confessions and substantial evidence corroborating those confessions were sufficient proof of the *corpus delicti*.[9] Alternatively, the State argued that Texas courts should recognize an exception to the *corpus delicti* rule for cases involving trustworthy admissions of sexual offenses committed against victims incapable of outcry.[10]

The court of appeals held that there was some evidence outside of the extrajudicial confession which, considered alone or in connection with the confession, showed that the crime actually occurred.[11] The court highlighted details of Appellant's wife's testimony that tended to corroborate Appellant's confessions, including her taking the child's shorts off because they were too small, her being on the patio with her daughter while Appellant and the child were in the house, and Appellant's fasting.[12] In addition, the court summarized the general testimony given by Jenks

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[8] *Shumway v. State*, No. 09-18-00218-CR, No. 09-18-00219-CR, 2020 WL 86780, at *4 (Tex. App.—Beaumont January 8, 2020, pet. granted) (mem. op., not designated for publication).

[9] State's Brief on Original Appeal, p. 5.

[10] State's Brief on Original Appeal, p. 8.

[11] *Shumway*, 2020 WL 86780, at *4.

[12] *Id.* at *6.

and the child's mother.[13] According to the court of appeals, the testimony of Jenks, Appellant's wife, and the child's mother "rendered the commission of the offense more probable than without such evidence."[14]

Appellant filed a petition for discretionary review that presented four grounds for review.[15] In sum, Appellant asks this Court to reverse the judgment of the court of appeals because it improperly applied our *corpus delicti* case law. The State argues that we should uphold the court of appeals' judgment because we have long recognized that a confession may be used to aid in the establishment of the *corpus delicti* and the court of appeals reached the correct conclusion. In the alternative, the

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[13] *Id.*

[14] *Id.* at *6 (citing generally *Rocha v. State*, 16 S.W.3d 1, 4 (Tex. Crim. App. 2000); *Salazar v. State*, 86 S.W.3d 640, 645 (Tex. Crim. App. 2002)).

[15] Appellant's grounds for review are:

> Question 1- Does the corpus delicti rule require evidence totally independent of a defendant's extrajudicial confession showing that the 'essential nature' of the charged crime was committed by someone?
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> Question 2- Can independent evidence as to time, motive, opportunity, state of mind of the defendant, and/or contextual background information satisfy the corpus delicti rule in an indecency with child charge when there is zero evidence of sexual contact?
>
> Question 3- Is the evidence legally sufficient to support convictions for indecency with a child when the independent evidence does not tend to establish sexual contact?
>
> Question 4- Did the Ninth Court of Appeals improperly circumvent The Court of Criminal Appeals 2015 ruling on corpus delicti in *Miller v. State*, 457 S.W.3d 919 (Tex. Crim. App. 2015) which expressly declined to use a trustworthiness standard regarding the legal sufficiency of confessions?

State re-urges its arguments for an exception to the *corpus delicti* rule for sexual offenses committed against victims incapable of outcry. While we disagree with the State's first argument, we agree that a narrow exception to our traditional application of the *corpus delicti* rule is warranted, as illustrated by the unique circumstances presented in this case. Given this, we will affirm the judgment of the court of appeals.

The *Corpus Delicti* Rule

The *corpus delicti* rule is a judicial rule of evidentiary sufficiency "affecting cases in which there is an extrajudicial confession."[16] It requires that, "[w]hen a conviction is based on a defendant's extrajudicial confession, that confession does not constitute legally sufficient evidence of guilt without corroborating evidence independent of that confession showing that the essential nature of the offense was committed."[17] The *corpus delicti* rule essentially adds an additional requirement to our traditional *Jackson v. Virginia* legal sufficiency analysis for cases involving extrajudicial confessions.[18]

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[16] *Miller v. State*, 457 S.W.3d 919, 925 (Tex. Crim. App. 2015).

[17] *Miranda v. State*, 620 S.W.3d 923, 928 (Tex. Crim. App. 2021) (citing *id.* at 924).

[18] *Harrell v. State*, 620 S.W.3d 910, 914 (Tex. Crim. App. 2021) ("In cases involving extrajudicial confession when 'beyond a reasonable doubt' is the burden, not only must the evidence be legally sufficient under *Jackson* but it also must tend to show the *corpus delicti* of the offense."); *see also Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (In reviewing the sufficiency of the evidence, "the relevant question is whether, after viewing the evidence in

Under the *corpus delicti* rule, the corroborating evidence does not need to independently prove the crime, but must simply make the occurrence of the crime more probable than it would be without the evidence.[19] Courts have traditionally applied the *corpus delicti* rule to ensure that a person is not convicted "solely on his own false confession to a crime that never occurred."[20] The rule has been applied in Texas for at least one hundred sixty years and originated over three hundred years ago in England.[21] It first developed in reaction to a slew of cases in which defendants admitted to the "murder" of missing persons, were executed, and, naturally, were not around for exoneration when their "victims" later turned up, much more alive than their self-admitted "murderers."[22]

The *corpus delicti* of a particular crime is simply "the fact that the crime in question has been committed by someone."[23] It does not require proof that the specific defendant committed the criminal act, just that the

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the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.") (emphasis in original).

[19] *Harrell*, 620 S.W.3d at 914.

[20] *Carrizales v. State*, 414 S.W.3d 737, 740 (Tex. Crim. App. 2013).

[21] *See Miller*, 457 S.W.3d at 927 (citing *Jones v. State*, 13 Tex. 168, 177 (1854)); *see also* David A. Moran, *In Defense of the Corpus Delicti Rule*, 64 OHIO ST. L.J. 817, 826–27 (2003).

[22] Moran, *In Defense of the Corpus Delicti Rule*, 64 OHIO ST. L.J. at 826–27.

[23] *Fisher v. State*, 851 S.W.2d 298, 303 (Tex. Crim. App. 1993).

crime itself occurred.[24] The *corpus delicti* of indecency with a child is the occurrence of a sexual touching of the child with the intent to arouse or gratify the sexual desire of a person.[25]

We recently reaffirmed the general application of the rule in Texas after considering arguments in favor of alternative corroboration requirements.[26] In *Miller v. State*, we highlighted the importance of the policy behind the *corpus delicti* rule but also acknowledged the real possibility that the rule could "result in the exclusion of reliable confessions."[27] We expressed concern that "when the case involves 'the most vulnerable victims, such as infants, young children, and the mentally infirm,' the corpus delicti rule can be used to block convictions for real crimes that resulted in no verifiable injury."[28] Ultimately, we adopted a "closely related crime" exception to strike a balance between stark public policy concerns and the risk of diluting the rule to a nullity.[29]

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[24] *Id*. (citing 1 W. LaFave & A. Scott, *Substantive Criminal Law* § 1.4 at 24 (2nd ed.1986)).

[25] *Moreno v. State*, 823 S.W.2d 366, 367 (Tex. App.—Corpus Christi 1991, pet. ref'd); *Gonzales v. State*, 4 S.W.3d 406, 412–3 (Tex. App.—Waco 1999, no pet.).

[26] *Miller*, 457 S.W.3d at 926.

[27] *Id.* at 925–27.

[28] *Id.* at 927 (citing *Colorado v. LaRosa*, 293 P.3d 567, 574 (Colo. 2013)).

[29] *Id.*

The "closely related crime" exception applies when a defendant confesses to multiple, closely-related offenses, but the *corpus delicti* of only some of the offenses is shown.[30] With our adoption of the "closely related crime" exception, the *corpus delicti* rule was reaffirmed, but we also recognized the Court's ability to craft an exception to the rule when public policy considerations outweigh concerns about undermining the efficacy of the rule itself.

Analysis

In this case, Appellant argues that his convictions for indecency with a child should be overturned because the *corpus delicti* rule requires some evidence of actual sexual touching, rather than evidence merely corroborating the Appellant's confessions. While we agree with Appellant that our precedent does not allow a confession alone to be used to establish the *corpus delicti*, we also agree with the State's argument calling for an exception to the rule that applies in situations like the one presented in this case. Accordingly, we recognize a narrow exception to the strict application of the *corpus delicti* rule when the evidence introduced at trial shows that the confessed conduct was committed against a child who was incapable of outcry and constituted a sexual

[30] *Id*.

offense that did not result in perceptible harm. In such a case, if the record reflects that the confession itself is sufficiently corroborated, then reviewing courts will not be required to overturn a conviction that is otherwise based upon legally sufficient evidence due to a failure to satisfy the *corpus delicti* rule.

The *Corpus Delicti* Rule Was Not Satisfied

We have long held that "in the establishment of the *corpus delicti*, the confessions are not to be excluded, but are to be taken in connection with the other facts and circumstances in evidence."[31] For example, in *Kugadt v. State*, we upheld a murder conviction in the face of a challenge to the sufficiency of the *corpus delicti*.[32] Specifically, we used the defendant's statement to tie together other facts and circumstances surrounding the death of his sister to satisfy the *corpus delicti* rule.[33] We recognized that the confession, rather than being completely ignored, could be used to help analyze other available evidence—a concept that we have noted well over one hundred years later.[34]

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[31] *Kugadt v. State,* 44 S.W. 989, 996 (Tex. Crim. App. 1898).

[32] *Id.* at 998.

[33] *Id.* at 994–98.

[34] *See Salazar*, 86 S.W.3d at 645 (citing *Watson v. State*, 227 S.W.2d 559, 562 (Tex. Crim. App. 1950) ("it satisfies the corpus delicti rule if *some evidence exists outside of the extra-judicial confession*, which, *considered alone or in connection with the confession*,

But the traditional "*Kugadt* Rule" is not an end run around the basic requirements of the *corpus delicti* rule.[35] There still must be "proof of the corpus delicti, outside of the confession."[36] This is illustrated by recent elaborations of the *corpus delicti* rule that require "evidence independent of a defendant's extrajudicial confession show[ing] that the 'essential nature' of the charged crime was committed by someone."[37] Although a court can use the confession in its analysis, there must be some evidence outside of the confession that, standing alone or in conjunction with the confession, provides proof "that the crime charged has been committed by someone."[38] Essentially, the *Kugadt* Rule simply allows a confession to "render sufficient circumstantial evidence that would be insufficient without it," but it still requires "other facts and circumstances" outside of

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shows that the crime actually occurred.") (emphasis added)).

[35] *See Smith v. State*, 57 S.W.2d 163, 167 (Tex. Crim. App. 1933) (op. on. rehearing) (citing *Kugadt* for the proposition "[t]he confession may be looked to *in aid of other proof* of the corpus delicti.") (emphasis added); *Hernandez v. State*, 8 S.W.2d 947, 949 (Tex. Crim. App. 1927) (op. on. rehearing) (noting, after discussing *Kugadt*, that "[i]n whatever form the principle be stated it is perfectly clear that some proof *other than the confession* is demanded which shows or tends to show that a crime has been committed by some person.") (emphasis added).

[36] *Watson*, 227 S.W.2d at 562.

[37] *Hacker v. State*, 389 S.W.3d 860, 866 (Tex. Crim. App. 2013).

[38] *Watson*, 227 S.W.2d at 562.

the confession.[39]

In terms of sufficient facts and circumstances outside of the confession, we have historically required something more compelling than the type of non-confession facts presented in this case.[40] For example, in *Cokeley v. State*, the State charged the defendant with the rape of a "mentally unsound" woman.[41] To prove its case, the State introduced a confession from the defendant admitting to having intercourse with the victim, but the State could not call the victim to testify because of her mental condition.[42] We held that the non-confession evidence was insufficient to corroborate the confession or allow the *corpus delicti* to be

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[39] *Id.; see also Hough v. State*, 929 S.W.2d 484, 486–87 (Tex. App.—Texarkana 1996, pet. ref'd.) (discussing a potential conflict in Court of Criminal Appeals authorities regarding "whether any evidence tending to demonstrate the reliability of the confession will serve as corroboration, even if it does not relate to the corpus delicti" and concluding that the weight of Court of Criminal Appeals authority requires the corroboration relate to the corpus delicti).

[40] *See Fredericson v. State*, 70 S.W. 754, 756 (Tex. Crim. App. 1902) (affirming a conviction of rape based upon a record showing that the victim was pregnant, the accused had opportunity to commit the crime, and confessed); *Thomas v. State*, 299 S.W. 408, 410–11 (Tex. Crim. App. 1927) (op. on rehearing) (affirming a rape conviction upon a record showing that the defendant and victim had been seen together near the time of the offense, tracks and footprints were found near the area described in the confession, and neighbors testified to a physical condition of the victim's female organs that coincided with the defendant's confession); *Kincaid v. State*, 97 S.W.2d 175, 178–79 (Tex. Crim. App. 1936) (holding, in an incest case, that the defendant and victim's solitary cohabitation, sleeping in adjoining rooms, and the victim's pregnancy established the element of intercourse).

[41] *Cokeley v. State*, 220 S.W. 1099, 1099 (Tex. Crim. App. 1920).

[42] *Id.*

proved with the aid of the confession.[43] We specifically looked to evidence that the defendant was seen at the victim's home and walked away from officers when they approached to arrest him, but we concluded that these circumstances were insufficient in the absence of some proof of "intimacy that would show the fact of intercourse."[44] In doing so, we specifically cited to *Kugadt* for the "fairly recognized rule" that "the confession may be used to aid in proving the corpus delicti, subject, however, to the above statement that it cannot of itself prove the corpus delicti."[45] We noted that "[u]nless there were facts and circumstances *independent of the confession* which showed the intercourse of appellant with [the victim], the confession would not be sufficient."[46]

In cases in which we did find sufficient facts of the sexual act, apparent injury or a resulting pregnancy helped satisfy the rule. For instance, in *Fredericson v. State*, a case of rape, we held that, in the absence of testimony from the mentally ill victim, testimony that the victim was two or three months pregnant "indicates that some one had

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[43] *Id.* at 1100.

[44] *Id*.

[45] *Id*.

[46] *Id.* (emphasis added).

had carnal intercourse with her" and "[t]his established that some one had committed the offense upon her."[47] While we also noted the defendant's confession and cited to the *Kugadt* case, it was only in conjunction with the independent evidence of carnal knowledge presented by the pregnancy.[48] Following the *Fredericson* logic, in *Kincaid v. State*, a case of incest, the State proved the necessary element of intercourse with evidence that the niece had given birth.[49] This provided a circumstance, aside from the defendant's confession, that the defendant had "carnally known his niece[.]"[50]

Even though these are admittedly older cases, they are largely in line with our fairly recent handling of the *corpus delicti* rule. For instance, in *Salazar v. State*, we held that the *corpus delicti* rule simply requires independent evidence of the "essential nature" of the charged crime, and the *corpus delicti* of aggravated sexual assault on a child was satisfied by evidence that "someone had sexual contact with [the victim's] private

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[47] *Fredericson*, 70 S.W. at 756.

[48] *Id.*

[49] *Kincaid*, 97 S.W.2d at 178 ("She gave birth to a child. This established intercourse.") (internal citations omitted).

[50] *Id.*

part and that the act was performed with criminal intent."[51] This "essential nature" would still require some independent proof of the actual criminal conduct.[52]

Here, even if we accept that Appellant's confessions could be used in aid of establishing the *corpus delicti*, there was no independent evidence of the criminal act for them to aid. The State presented evidence that Appellant had opportunity to commit the crime when he was watching the child without his wife. The State also presented evidence of Appellant's guilty conscience by showing that Appellant was emotionally withdrawn after the weekend and that he was fasting as part of some spiritual experience.

But the State presented no independent evidence supportive of the sexual touching itself. It couldn't. By the State's own evidence, the victim of the assault could not relate the circumstances of the offense. The assault was described as "touching to the area" and "rubbing to the area," which did not result in any injury. The State's own medical witness noted that there would likely be no injury resulting from penetration because "this part of the body is very similar to the cells on the inside of

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[51] *Salazar*, 86 S.W.3d at 644–45.

[52] *Id.*

your cheek, and it heals very, very fast."

While the State points to evidence of opportunity and consciousness of guilt, these circumstances do not provide independent proof of the sexual contact.[53] That makes this case similar to *Cokeley*, in which there was no "intimacy that would show the fact of intercourse," even though there was evidence that the defendant had opportunity and had a guilty conscience. It also distinguishes this case from *Kincaid* and *Fredericson*, cases where physical evidence combined with the defendant's confession proved that the act itself had occurred.[54]

Even though our precedent does suggest that we can look to the confession in aid of establishing the *corpus delicti*, our precedent still requires some evidence outside that confession. Under a strict application of the rule, the State did not satisfy the *corpus delicti* rule in this case. But this does not end our analysis.

The "Incapable of Outcry" Exception

The State also argues that this Court should recognize an exception to the *corpus delicti* rule for cases involving trustworthy admissions to

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[53] *See Watson*, 227 S.W.2d at 562 ("There must be proof of the corpus delicti, outside of the confession. The confession of the accused alone is not sufficient.").

[54] *See Cokeley*, 220 S.W. at 258; *Kincaid*, 97 S.W.2d at 108; *Fredericson*, 70 S.W. at 756.

sexual offenses committed against infants who are incapable of outcry. The State points out that strict application of the rule could effectively incentivize the victimization of non-verbal infants, especially through conduct unlikely to result in any perceptible injury, such as inappropriate sexual contact. Upon considering the alternative, illustrated by cases such as *Cokeley*, we agree. We recognize a discrete exception to strict application of the *corpus delicti* rule for cases in which a defendant provides a well-corroborated confession to a sexual offense that was committed against a child who was incapable of outcry and that did not result in perceptible harm. When the State presents sufficient corroborating evidence underlying a confession in such a case, the *corpus delicti* rule will not bar conviction.

We have already expressed concern that an unyielding application of the *corpus delicti* rule could be used to "block convictions for real crimes that resulted in no verifiable injury" against our society's most vulnerable victims.[55] Specifically, in many sex-related crimes against infants, a defendant's admission will often be the only evidence that the crime occurred.[56] And even recent clarifications to the rule, such as the

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[55] *Miller*, 457 S.W.3d at 927 (citing *LaRosa*, 293 P.3d at 574).

[56] *See LaRosa*, 293 P.3d at 575 ("We are also aware that the rule operates disproportionately in cases where no tangible injury results, such as in cases involving

"closely-related crimes" exception acknowledged in *Miller*, only operate when the defendant has confessed to multiple crimes *and* when at least one of those crimes results in independent evidence of the criminal conduct.[57] Strict application of the *corpus delicti* rule would seem to render some crimes—such as indecent contact with a child—unprovable when committed against infant children.[58]

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inappropriate sexual contact, or where criminal agency is difficult or impossible to prove, such as in cases involving infanticide or child abuse."); *State v. McGill*, 50 Kan. App. 2d 208, 224, 328 P.3d 554, 564 (2014) ("In sex crimes against young children, the offender's admission to the act is often how the crime is discovered and sometimes may be the only direct evidence proving that the crime occurred."); *see, e.g.*, *Cokeley*, 220 S.W. at 1099–1100; *State v. Ray*, 130 Wash. 2d 673, 926 P.2d 904, 905 (1996) (holding that corpus delicti was not satisfied were defendant accused of molesting his three-year-old daughter because there was no evidence independent of the confession to show touching of the sexual organs); *Daniels v. State*, No. 2-06-258-CR, 2007 WL 2460263 (Tex. App.—Fort Worth August 31, 2007) (op. on rehearing) (mem. op. not designated for publication) (holding corpus delicti not satisfied for two charges of aggravated sexual assault against a mentally handicapped individual because the State failed to offer evidence outside of the defendant's confession); *Colorado v. Robson*, 80 P.3d 912, 913–14 (Colo. Ct. App. 2003) (holding corpus delicti not satisfied in a case of sexual assault against defendant's infant daughter where evidence outside of the confession established merely opportunity to commit the crime).

[57] *See Miller*, 457 S.W.3d at 926–29.

[58] *Compare Fredericson*, 70 S.W. at 756 ("[T]he state depended on evidence to the effect that the [victim] was enceinte,—about two or three months in a state of pregnancy. This testimony indicates that some one had had carnal intercourse with her[.]"); *Thomas*, 299 S.W. at 410–11 (affirming a rape conviction based upon a record showing that the defendant and victim had been seen together near the time of the offense, tracks and footprints were found near the area described in the confession, and neighbors testified to a physical condition of the victim's female organs that coincided with the defendant's confession); *Kincaid*, 97 S.W.2d at 108 (holding that the victim's pregnancy established the element of intercourse.), *with* TEX. PEN. CODE § 21.11(a)(1), (a)(2), (c) ("A. A person commits an offense if, with a child younger than 17 years of age, [. . .] the person: (1) engages in sexual contact with the child or causes the child to engage in sexual contact; or (2) with intent to arouse or gratify the sexual desire of any person: (A) exposes the person's anus or any part of the person's genitals, knowing the child is present; or (B) causes the child to expose the child's anus or any part of the child's genitals. [. . .] (c) In this section, "sexual contact" means the following acts, if committed with the intent to arouse or gratify the sexual desire of any person: (1) *any touching by a person, including touching through clothing* of the anus, breast, or any part of the genitals of a child; or (2) *any touching of any*

Some courts have embraced an alternative to the traditional *corpus delicti* rule for cases in which the confessed criminal conduct would not result in a perceptible harm.[59] For instance, in *State v. Dern*, the Supreme Court of Kansas recognized that an alternative analysis was required when "the nature and circumstances of [a] crime are such that it [does] not produce a tangible injury."[60] In doing so, the Kansas court looked to its own prior precedent, which often provided an "alternative path" to satisfaction of the *corpus delicti* rule in cases involving "no tangible injury."[61] The *Dern* court cited to *State v. Cardwell*, a case of rape, in which "there was no direct evidence in court of the *corpus delicti*—that the crime had in fact been committed" and "[t]he case for the state rest[ed] upon extrajudicial admissions and upon circumstantial evidence as to these essential facts."[62] In reaction to this lack of tangible evidence, the *Cardwell* court adopted "the reasonable rule that the law demands, and only demands, the best proof of the *corpus delicti* which,

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part of the body of a child, including touching through clothing, with the anus, breast, or any part of the genitals of a person.") (emphasis added).

[59] *See State v. Dern*, 303 Kan. 384, 402–412, 362 P.3d 566 (2015); *see also State v. Bishop*, 431 S.W.3d 22, 58–59 (Tenn. 2014).

[60] *Dern*, 303 Kan. at 410.

[61] *Id.* at 408–10.

[62] *See State v. Cardwell*, 90 Kan. 606, 608, 135 P. 597 (1913).

in the nature of the case, is attainable."[63] The *Cardwell* court elaborated that the *corpus delicti* "may be established by evidence of admissions of guilt by the accused supported by circumstantial evidence tending to *corroborate the admissions*; provided all the evidence is sufficient in the estimation of the jury and trial court to establish the guilt of the accused beyond a reasonable doubt."[64] As the Kansas Supreme Court later admitted in *Dern*, the *Cardwell* logic plotted an "alternate course" from the strict application of the *corpus delicti* rule but found that this alternate approach was appropriate when the "nature and circumstances of [a] crime are such that it did not produce a tangible injury."[65]

This understanding recognizes that "certain crimes—for example, when there is a clear and tangible physical injury or harm as there is in a homicide—should by their nature produce substantial independent evidence of the corpus delicti."[66] However, "different types of crimes—for example, when the harm may be inchoate as it is in certain instances of sexual abuse—are by their nature less likely to producing [sic] evidence

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[63] *Id*.

[64] *Id.* (emphasis added).

[65] *Dern*, 303 Kan. at 408.

[66] *McGill*, 50 Kan. App. 2d at 230 (Stegall, J., concurring) (discussing the Kansas Supreme Court's decision in *Cardwell*).

of the corpus delicti apart from the defendant's confession itself."[67] *Cardwell* recognized that in such cases, the corpus delicti rule only demands the best proof of the corpus delicti which, in the nature of the case, is attainable.[68]

The record in the present case presents a stark illustration of the concerns recognized by this Court in *Miller* and addressed by the Kansas Supreme Court in *Dern* and *Cardwell*. The victim in this case, a seventeen-month-old infant, was incapable of communication and the underlying criminal conduct was not the kind that would result in perceptible harm. At the same time, the State provided numerous pieces of evidence that corroborated contextual facts contained in Appellant's confessions sufficient to vindicate the underlying purpose of the rule to protect against false confessions. Such a situation illustrates the need for a discrete exception to the traditional application of the *corpus delicti* rule in Texas.

First, the record shows that the child in this case was exactly the kind of uniquely vulnerable victim that justified the exception we

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[67] *Id.*

[68] *Cardwell*, 135 P. at 598; *see also McGill*, 50 Kan. App. 2d at 230 (Stegall, J. concurring)("In such cases, independent evidence is still required in order to vindicate the purpose of the rule to protect against false confessions, however, the independent evidence may corroborate the facts contained in the admissions rather than the corpus delicti itself.")

recognized in *Miller*.[69] Sergeant Armstrong testified that the child was not verbal and did not meet the requirements for a Safe Harbor interview due to her age. Armstrong noted that the general requirement for an interview through Safe Harbor was three years old, but the child was just under eighteen months old at the time of the investigation. Nurse Ferrell confirmed that the child was "pre-verbal" and was not able to tell her what happened due to her age. In fact, medical paperwork admitted at trial listed the child's primary mode of communication as "pointing" and "making unidentifiable sounds." The child's mother clarified that the child "knew a few words" but did not speak in sentences. She also confirmed that the child was not able to relay any information about the incident. This evidence highlights the particular vulnerability of this discrete sub-group of victims and shows why the lack of perceptible harm is particularly dangerous when the victim can't relate that a crime has occurred.

Second, the record shows why the offense of indecency with a child, as committed in this case, could not be reasonably expected to result in independent evidence of the offense such as perceptible harm.[70] Nurse

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[69] *See Miller*, 457 S.W.3d at 927.

[70] *See McGill*, 50 Kan. App. 2d at 224.

Ferrell's testimony established that, medically speaking, it would not be reasonable to expect to find any kind of injury because "that history of what was provided, that of touching to the area, rubbing to the area, that's not any different than really if you're cleaning your child in this area." Ferrell testified that, even if there had been some kind of penetrating trauma, "I would not expect there to be injury, because this part of the body is very similar to the cells on the inside of your cheek, and it heals very very fast." Ferrell further noted that, in general, the presentation of injury in a child's genital area is incredibly rare and based that conclusion on publications within her field and her own experience of examining over 5,000 children. This testimony demonstrated the lack of perceptible evidence resulting from the improper sexual touching of an infant or young child.[71]

Combining the inability of the child victim to communicate the harm with the absence of perceptible harm, the discrete facts in this record starkly illustrate the concerns that we acknowledged in *Miller* and the

[71] *See* TEX. PEN. CODE § 21.11(c) ("In this section, "sexual contact" means the following acts, if committed with the intent to arouse or gratify the sexual desire of any person: (1) *any touching by a person, including touching through clothing* of the anus, breast, or any part of the genitals of a child; or (2) *any touching of any part of the body of a child, including touching through clothing*, with the anus, breast, or any part of the genitals of a person.") (emphasis added); *see also Miller*, 457 S.W.3d at 927.

Kansas Supreme Court dealt with in *Dern*.[72] In circumstances such as this, we must balance the need to protect society's most innocent victims from an actual crime only provable by a defendant's confession against the need to protect those who might confess to a crime that never occurred.[73] We cannot condone a reversal when a defendant voluntarily confesses—in great and corroborated detail—to abusing an infant child simply because the infant child cannot provide independent evidence of the abuse and the crime itself leaves no trace.

As we have said in the context of a murder case with no body: "'The notion that the careful and meticulous murderer might escape punishment by destroying or forever concealing the body of his victim is a distasteful one,' and the murderer's successful disposition of the victim's remains should not be rewarded."[74] In the same way, we cannot say that a defendant should be rewarded because he picked a particular victim and crime that would result in his word being the only evidence of the 'body of the crime,' which could be forever concealed by strict

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[72] *See Miller*, 457 S.W.3d at 927*; see also Dern*, 303 Kan. at 408.

[73] *See, e.g.*, *McGill*, 50 Kan. App. 2d at 224.

[74] *Nisbett v. State*, 552 S.W.3d 244, 264 (Tex. Crim. App. 2018) (citing *McDuff v. State*, 939 S.W.2d 607, 623 (Tex. Crim. App. 1997) (Baird, J., concurring) (citing *Epperly v. Commonwealth*, 224 Va. 214, 294 S.E.2d 882, 891 (Va. 1982))).

application of the *corpus delicti* rule.[75] Accordingly, we agree with the State and recognize a discrete and limited exception to the *corpus delicti* rule in Texas.[76] This exception applies in cases in which the evidence introduced at trial shows that the defendant voluntarily confessed to a sexual offense against an infant who was incapable of outcry and that the confessed conduct did not result in any perceptible harm. In such a case, if the record reflects sufficient corroborating facts and circumstances of the confession itself, then reviewing courts should uphold the conviction so long as there is legally sufficient evidence under the standard set out in *Jackson v. Virginia*.

In the present case, the State introduced sufficient evidence to meet both preliminary requirements. The infant child was not able to communicate that a crime occurred against her and the specific criminal conduct to which Appellant confessed was a sexual offense that would not have resulted in any perceptible harm. The State also corroborated key facts of Appellant's confessions through the testimony of other witnesses, including: (1) Appellant watched the child at a time consistent with his confession; (2) Appellant's wife took the child's shorts off for a portion of

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[75] *See Nisbett*, 552 S.W.3d at 264.

[76] *See Dern*, 303 Kan. at 402–412.

the weekend; (3) Appellant's wife left Appellant with the child while she was in the backyard with her daughter; and (4) Appellant's wife left Appellant to watch the children while she met with friends for lunch during the weekend. In addition, the State presented evidence that Appellant was fasting after the target weekend (which signaled some internal religious turmoil); Appellant was emotionally withdrawn after the weekend (which also signaled that something in fact had occurred); and Appellant confessed consistently and voluntarily to two separate individuals (neither of whom held coercive powers of the State over him). These facts and circumstances provided sufficient corroboration of the confessions at issue in this case.

Conclusion

When the evidence introduced at trial shows that a defendant confessed to committing conduct against a pre-verbal child, who is incapable of outcry, and the confessed conduct constitutes a sexual offense that would not result in any perceptible harm, a defendant's sufficiently corroborated confession to the conduct should not result in an acquittal simply because of an inability to satisfy the *corpus delicti* rule. As shown in this particular case, the victim was unable to provide independent evidence of the crime due to her inability to relate the

existence of the crime and the crime constituted a sexual offense that did not result in any perceptible harm. Because the State presented sufficient corroborating evidence of the confessions, the *corpus delicti* rule should not bar Appellant's convictions. We affirm.

Yeary, J., concurs only in the result for the reasons stated in his concurring opinion in *Miranda v. State*, 620 S.W.3d 923, 930-31 (Tex. Crim. App. 2021).

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